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No. 928

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

DORSEY K. OFFUTT, An Attorney, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT AND APPENDIX

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INDEX

	Page
PETITION FOR WRIT OF CERTIORARI	1
The Opinions Below	2
Jurisdiction	2
Questions Presented	3
Constitutional Provisions, Statute and Rule Involved	4
Statement of the Case	6
Reasons for Granting the Writ	11
I. The court below should have dismissed the application of the United States Attorney, discharged the order to show cause issued by the District Court charging petitioner with criminal contempt because of the failure to comply with Rule 42(b) of the Federal Rules of Criminal Procedure, because of the denial to petitioner of that speedy trial which was guaranteed him by the Sixth Amendment to the Constitution and because insufficient	12
II. The court below should have remanded the case with instructions that a judgment be entered acquitting petitioner of Charges I and II of the District Court's order to show cause because that court found and decided that these charges had been established only by a fair preponderance of the evidence" rather than beyond a reasonable doubt". The second order of the District Court attempting to find guilt on a different and more prejudicial basis, after petitioner perfected his appeal and filed his bail bond, was beyond the power of the District Court to enter and should have been determined to have been a nullity	22
III. The second judgment of conviction belatedly entered by the District Court, which was more prejudicial to petitioner and found him guilty on	

Page

a different basis than that contained in the first finding and judgment of the District Court, was a nullity and void as an attempt to twice sentence and punish the petitioner for the same offense in violation of the Fifth Amendment to the Constitution 26

Appendix 1a

TABLE OF CASES CITED

In re Bergerow, 1901, 133 Cal. 349, 65 P. 828 16
Clark v. United States, 289 U.S. 1, 11, 87 L. Ed. 609 .. 21
Cottingham, In re, et al. (Colo.) 182 P. 2 18
Delaton, In re, 105 N. C. 59, 11 S. E. 244 19
Dickoff v. Dewell, 1942, 152 Fla. 240, 9 So. 2d 804 16
Goldsmith v. Valentine, 35 U.S. App. D.C. 299 22
Gompers v. Bucks Stove & Range Co., 221 U. S. 418, 31 S. Ct. 492, 55 L. Ed. 797, 34 L.R.A. (U.S.) 874.. 25
Harris v. Municipal Court, 1930, 209 Cal. 55, 285 P. 699 16
Ex Parte Hudgings, 249 U. S. 378 19
Krueger v. Krueger, 32 S. D. 470, 143 N. W. 368 19
Ex Parte Lange, 18 Wall. 163, 167-174, 21 L. Ed. 872.. 26
Lasier v. Lasier, 47 U.S. App. D.C. 80 22
Lombardo v. United States, 58 U.S. App. D.C. 245, 29 F. 2d 445 25
Maltby v. Thompson (D.C. Mun. App.) 55 A. 2d 142 .. 22
Ex Parte Miller, 1919, 66 Colo. 261, 180 P. 749 16
Michaelson v. United States, ex rel., Chicago, St. Paul, Minneapolis & Omaha Railway Co., 266 U. S. 42, 45 S. Ct. 18, 69 L. Ed. 162, 35 A.L.R. 451 25
Offutt v. United States, 93 U.S. App. D.C. 148, 208 F. 2d 842, 348 U. S. 14, 99 L. Ed. 10 .....10, 12, 14
People v. Molinari, 1937, 23 Cal. App. 2d Supp. 761, 67 P. 2d 767 16
Potts v. Catherton, (D.C. Mun. App.) 82 A. 2d 133 ... 22
Petition of Provoo, 17 F.R.D. 183 15
Purman v. Marsh, 49 U.S. App. D.C. 125, 261 F. 1005.. 22
Simmons v. United States, 89 F. 2d 571 22
Smith v. Pollin, 90 U.S. App. D.C. 178, 194 F. 2d 349 .. 22
State v. Maurignos, 1805, T.U.P. Charlt., Ga. 24 16
State v. Phil, 1827, 1 Stew., Ala. 31 16
State v. Sims, 1807, 1 Tenn. 25 16

Page

State v. Stalnaker, 1806, 2 Brev., S. C. 44 16
State v. Stillwell, 8 Or. 610, 157 P. 970 18
Tracy v. State, 28 Ohio Cir. Ct. Rep. 453 18
United Mine Workers v. United States, 330 U. S. 258, 67 S. Ct. 677, 91 L. Ed. 884 25
United States v. Appel, 211 F. 495 21
United States v. Arbuckle, 48 F. Supp. 537 21
United States v. Benz, 282 U. S. 304, 75 L. Ed. 354 ... 27
United States of America v. Henry L. Peckham, Jr., Criminal No. 579-52 6
U. S. v. McWilliams, 69 F. Supp. 812 17
U. S. v. McWilliams, 163 F. 2d 695 17
Von Feldstein v. State, 1915, 17 Ariz. 245, 150 P. 235.. 16
Watts and Sachs, In Re, 190 U. S. 1 18
Whitney v. Frisbie, 6 D. C. 262 22
Yule v. State, 1914, 16 Ariz. 134, 141 P. 570 16

CONSTITUTIONAL PROVISIONS, STATUTES AND RULE INVOLVED

Federal Rules of Criminal Procedure, Rule 42 .... 3, 5, 11, 12, 13, 14
Title 18, Section 401, U. S. Code Annotated 5, 6
United States Constitution, V Amendment 2, 4, 11
United States Constitution, VI Amendment..2, 4, 11, 15, 17

MISCELLANEOUS CITED

Cooley, Constitutional Limitations, 8th Edition, 1927, Vol. 1, p. 645, et seq. 16

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No.

DORSEY K. OFFUTT, An Attorney, *Petitioner,*

v.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner, Dorsey K. Offutt, an attorney at law, respectfully prays that a Writ of Certiorari issue to review the decision and judgment of the United States Court of Appeals for the District of Columbia Circuit, Nos. 12750 and 12751, entered February 16, 1956, reversing two summary contempt judgments entered by Judge Charles F. McLaughlin of the United States District Court for the District of Columbia, and remanding the case to the District Court under erroneous instructions which deny petitioner his con-

stitutional rights under the Fifth and Sixth Amendments to the Federal Constitution and erroneously permit the sentencing twice of petitioner for the same offense.

THE OPINION BELOW

The United States District Court for the District of Columbia summarily adjudged petitioner in contempt on the same charges in two judgments entered in the District Court on May 11, 1955, without opinion (R. 16, 18).[1] The opinion of the United States Court of Appeals for the District of Columbia Circuit, reversing the District Court's two adjudications of contempt and remanding the case with erroneous instructions has not yet been reported. It appears in the Appendix at p. 4a *et seq.* and at R. 83-88.

JURISDICTION

The decision and judgment of the Court of Appeals were entered on February 16, 1956 (R. 83-88). Petitioner timely filed a petition for rehearing (R. 90-103). The Court of Appeals entered an order granting the petition for rehearing in part on March 12, 1956 (R. 105), which deleted certain language challenged by petitioner and substituted other language in lieu thereof, but in this order took no action on petitioner's request for rehearing. On April 6, 1956, the Court of Appeals, without opinion, denied the petition for rehearing (R. 106). The Court of Appeals has recalled and stayed its Mandate until May 6, 1956, pending application to this Court for certiorari. The jurisdiction of this Honorable Court is invoked under the Act of June 5, 1928, 28 U.S.C.A., Sections 1254 and

[1] Refers to transcript of record filed with the Clerk of this Court.

2101, and Rule 37 of the Federal Rules of Criminal Procedure.

QUESTIONS PRESENTED

I. Whether the court below should have dismissed the application of the United States Attorney for an order to show cause and discharged the rule to show cause issued thereon by the District Court charging petitioner with criminal contempt because of the failure to comply with the provisions of Rule 42(b) of the Federal Rules of Criminal Procedure, and because delays attributable to the prosecution resulted in the denial of a speedy trial of the charges against petitioner as guaranteed him by the Sixth Amendment to the Constitution of the United States. Whether, because the application and order to show cause used Judge Holtzoff's finding language and did not properly charge criminal contempts triable under Rule 42(b) the application, order and judgment thereon were nullities.

II. Whether or not the court below should not have remanded the case with instructions to enter a judgment acquitting petitioner of Charges I and III of the District Court's order to show cause because of the finding and ruling of the District Court that the charges had been established only by a "fair preponderance of the evidence" rather than "beyond a reasonable doubt". In this connection a further question is presented as to whether the District Court, after entering an order finding appellant guilty only by a fair preponderance of the evidence, after an appeal was perfected and the bail bond on appeal was filed pursuant to the terms of the order of conviction, could enter a second order finding appellant

guilty on a different and more prejudicial basis, that is, beyond a reasonable doubt without any recitals in the second order as to why it was entered.

III. Whether the imposition of a second order of conviction more prejudicial to petitioner finding him guilty on a different basis than that contained in the first finding and judgment of the District Court was a nullity beyond the jurisdiction of the District Court to enter and was void as an attempt to twice sentence and punish the petitioner for the same offense in violation of the Fifth Amendment to the Constitution of the United States.

CONSTITUTIONAL PROVISIONS, STATUTE AND RULE INVOLVED

The Fifth Amendment to the Constitution provides in part as follows:

> "No person shall be * * * deprived of life, liberty, or property, without due process of law; * * * nor be charged more than once with the same offense."

The Sixth Amendment to the Constitution provides in part as follows:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense."

Title 18, Section 401, U.S.C.A., provides:

"Power of Court:

A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—

(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

(2) Misbehavior of any of its officers in their official transactions;

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command."

FEDERAL RULES OF CRIMINAL PROCEDURE, Title 18, U.S.C.A., Rule 42. Criminal Contempt.

(a) "Summary Disposition.—A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

(b) "Disposition Upon Notice and Hearing.—A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant, or, on application of the United States Attorney, or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The

defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilty, the court shall enter an order fixing the punishment."

STATEMENT OF THE CASE

On March 11, 1955, in an original proceeding in the District Court the United States Attorney filed an application for an order to issue to petitioner to show cause why he should not be adjudged in criminal contempt of court (R. 2-4). In this application the criminal case entitled *United States of America* v. *Henry L. Peckham, Jr.,* Criminal No. 579-52, was referred to and the application stated that petitioner was the attorney of record for the defendant in that case. The application was not addressed to the Presiding Judge in the *Peckham* case and on the contrary was considered by another District Judge, Charles F. McLaughlin. No order had been entered prior to the filing of the application by the United States Attorney, either appointing Judge McLaughlin as the Judge to investigate and hear the charges concerning petitioner, nor had the United States Attorney or any of his assistants been appointed under Rule 42(b) to investigate the matter and report thereon to the court. The application concluded that the misbehavior of petitioner violated Title 18 U.S. Code Section 401 (R. 4). Notwithstanding that Judge McLaughlin had no personal knowledge as he was not present and did not see or hear the alleged contempts described in the United States Attorney's application,

he nevertheless entered an order which directed petitioner to show cause why he should not be adjudged in criminal contempt of court on the following charges:

I. On numerous occasions, he made insolent, insulting and offensive remarks to the court, and was guilty of gross discourtesy to the court.

II. On numerous occasions, he persisted in repeating questions, previously excluded by the court, in order to evade the court's rulings, in spite of admonitions by the court to the contrary. Many of these questions were obviously intended to besmirch a witness.

III. On several occasions he asked of witnesses questions that were highly prejudicial to the witness and for which there was no foundation. Thus, he asked Mary Ott, the victim of the abortions charged against the defendant, "*When* were you arrested in this case?" As a matter of fact she never had been arrested and when called to account by the court, Offutt only answered that he had a right to enquire *whether* the witness had been arrested in this case.

IV. He constantly tried to create an episode that might lead the court to direct a mistrial.

The order to show cause belatedly attempted to appoint the United States Attorney and two of his assistants to represent the District Court, that is, the United States in the matter (R. 4-5).

Petitioner moved to dismiss the application and discharge the rule as insufficient and on the grounds that Rule 42(b) of the Federal Rules of Criminal Procedure had not been complied with; that the United States Attorney prior to the filing of his application

had not been appointed to represent the court in the matter, and the application was improvidently filed because filed without the authority of the Presiding Judge in the case of *United States* v. *Henry L. Peckham, Jr.*

Petitioner further moved to dismiss the charges because the actions on which they were based occurred early in 1952 and all delays incident to bringing the charges to trial, which actual trial, or that is, summary hearing, occurred on May 9, 1955, were attributable to the prosecution and not to the petitioner, therefore, petitioner had been prejudiced and had been denied that speedy trial which was guaranteed him by the Sixth Amendment to the Constitution (R. 6-7). On April 5, 1955, the District Court denied petitioner's motion to dismiss the application and discharge the rule.

On March 21, 1955, petitioner filed his sworn return to the rule to show cause denying the unsworn charges set forth in the application of the United States Attorney and made a part of the order to show cause signed by Judge McLaughlin (R. 10-15).

On May 9, 1955, the District Court, with Judge McLaughlin presiding, conducted a summary hearing of the charges in the order to show cause. Judge McLaughlin proceeded summarily, refusing to permit petitioner to testify in his own defense or to produce witnesses or other evidence in explanation, mitigation, and/or in defense of the charges (R. 33). Petitioner's proffer of evidence (R. 13-15) was refused (R. 36). Over objections of petitioner the United States Attorney was permitted to offer in evidence and it was received the trial transcript of the *Peckham* case without proving that transcript and without desig-

nating what part or portions thereof were relied upon in support of the charges (R. 36-38). The District Court acquitted the petitioner on Charges II and IV of the order to show cause (R. 16).

On May 11, 1955, not in open court and not in the presence of petitioner, the District Court filed an order stating that it had been established by a preponderance of the evidence that petitioner was guilty of Charges I and III of the order to show cause and fined him $500.00, staying commitment in the event the fine was not paid until May 16, 1955, and ordered in the event an appeal was perfected that bond on appeal was fixed at $1,000.00 (R. 16). The petitioner filed his notice of appeal and furnished a copy thereof for service on the United States Attorney appealing from the judgment of May 11 finding him guilty of Charges I and III. Petitioner perfected his appeal by paying the necessary clerk's fees and by filing his bond on appeal in the sum of $1,000.00, as provided in the order of May 11, 1955 (R. 22).

Thereafter, and on the same day, on to-wit about 4:00 o'clock in the afternoon, after petitioner had perfected his appeal and had filed his bail bond, the District Court entered another order (R. 18) which purported to withdraw its first order of May 11, 1955 concerning Charges I and III and attempted to find petitioner guilty of Charges I and III "beyond a reasonable doubt". The second order contained no statement or recitals of any sort explaining why it was entered. Out of an abundance of precaution petitioner appealed from the second order. The two appeals were consolidated in the court below and heard together.

The court below on February 16, 1956, filed its decision and judgment (R. 83-88). The court below

found that when this Court decided *Offutt* v. *United States,* 348 U.S. 14, that it had remanded the case to the District Court for a hearing before a Judge other than Judge Holtzoff. The court below further found that in this hearing petitioner was entitled to submit evidence in his defense and therefore ordered a new trial. However, the court below did not decide nor pass upon the jurisdictional questions raised by petitioner which are being presented to this Court for decision. The court below refused on application for a rehearing to pass upon the questions which are presented in this petition.

The petition for rehearing in the court below pointed out that petitioner was entitled to have the case remanded with instructions to dismiss the application and discharge the rule or in the alternative with instructions to have a judgment of acquittal entered because of the failure of the prosecution to establish its case beyond a reasonable doubt, the only rule of guilt known to criminal law in the United States. The petition for rehearing also pointed out that certain casual, obiter and prejudicial statements which were contained in the decision below would prejudice any retrial of petitioner. In this connection the court below in considering the petition changed certain language in the opinion but refused to remand the case to the District Court with instructions to dismiss the application, discharge the rule, or in the alternative with instructions to the District Court to enter a judgment of acquittal because of the failure of the prosecution to establish guilt beyond a reasonable doubt. Nor did the court below discuss the contention of petitioner that the delays in bringing the charges to trial against the petitioner, which delays were attributable

to the prosecution, prejudiced petitioner and deprived him of that speedy trial guaranteed him by the Sixth Amendment to the Constitution. Nor did the court below rule on the question of whether or not the effort by the District Court without any explanation therefor to enter a second finding and a second judgment of conviction based on more prejudicial grounds was an invalid attempt to sentence the petitioner twice for the same offense in violation of the Fifth Amendment to the Constitution.

REASONS FOR GRANTING THE WRIT

This case presents for correction errors of the United States District Court for the District of Columbia not corrected by the United States Court of Appeals for the District of Columbia Circuit. The case is one of importance and involves grave questions dealing with the right of an accused in a contempt case not to be deprived of his liberty or fined contrary to the provisions of the Fifth Amendment, the Sixth Amendment, and Rule 42(b) of the Federal Rules of Criminal Procedure.

The court below has rendered a decision in conflict with applicable decisions of this Court and other Circuit Courts of Appeal, earlier decisions of the court below and other applicable decisions. The court below has permitted and sanctioned such a departure from the accepted and usual course of criminal proceedings relating to contempt as to call for the exercise of this Court's powers of supervision and correction.

The decision below has failed to apply the principle that guilt in a criminal case must be established beyond a reasonable doubt contrary to the Fifth Amendment, has failed to enforce the guarantee of a speedy trial,

and has permitted the sentencing of an accused twice for the same offense contrary to the Fifth Amendment.

I

The court below should have dismissed the application of the United States Attorney, discharged the order to show cause issued by the District Court charging petitioner with criminal contempt because of the failure to comply with Rule 42(b) of the Federal Rules of Criminal Procedure, because of the denial to petitioner of that speedy trial which was guaranteed him by the Sixth Amendment to the Constitution and because insufficient.

The two charges of criminal contempt of which petitioner was erroneously convicted below are identical with two of the charges which were considered by this Court in *Offutt* v. *United States,* 348 U.S. 14, 99 L. Ed. 10. In the *Offutt* case this Honorable Court reversed as erroneous the summary judgment of contempt of Judge Holtzoff of the District Court concerning these charges which had been erroneously upheld by the court below on appeal in *Offutt* v. *United States,* 93 U.S. App. D.C. 148, 208 F. 2d 842. In its remand this Court ordered that the hearing be conducted by a judge other than Judge Holtzoff who presided at the Peckham trial. Judge Holtzoff had elected to proceed summarily under Rule 42(a) of the Federal Rules of Criminal Procedure, and by way of a certificate adjudging petitioner in contempt without a hearing. This Court reversed and held this procedure to be error. Therefore, charges had to be filed below against petitioner before any hearing could be had thereon. Of course, Rule 42(a) being inapplicable because of the ruling of this Court in the *Offutt* case any such charges would be controlled by Rule 42(b).

Rule 42(b) contemplates the issuance of a notice only upon an investigation and an appropriate showing of probable cause and the appointment of counsel to prosecute where that is needed. Judge Holtzoff never appointed counsel to represent the United States, nor was any order by any other judge of the District Court entered appointing counsel to represent the court other than the order to show cause itself served on petitioner which was entered on March 11, 1955. Yet on March 11, 1955, the United States Attorney filed an application for an order to show cause and on the same day Judge McLaughlin of the District Court issued an order to show cause and in that order appointed the United States Attorney and certain of his assistants to represent the United States. We submit Rule 42(b) limits the bringing of charges of criminal contempt concerning open court contempts to the presiding judge in the case wherein the alleged contempts occurred. This is clear because Rule 42(b) uses the language "the judge". As we read Rule 42(b) it is only after contempt charges are filed by the judge who saw and heard the open court contempts that another judge not familiar with them thereafter can be appointed, when the presiding judge is disqualified, as here, to preside over the hearing. Under the rule it is for the judge who presided at the trial to take the necessary steps for the institution of charges which are to be heard by another judge. No order was entered by Judge Holtzoff, the presiding judge in the *Peckham* case, bringing the present charges nor did he appoint either the United States Attorney or some other attorney to investigate and prosecute them. Nor was any other order issued prior to the filing of the application by any other judge of

the District Court which appointed the United States Attorney and his assistants to act.

Therefor we submit the procedure followed below violated Rule 42(b) and is void. While the order to show cause recites an investigation by the attorneys signing the application, we are unable to understand how they could be authorized to investigate when they were not even appointed to do so and were only appointed in the order to show cause itself. In these circumstances any "investigation" obviously is incomplete, abortive and insufficient to warrant the issuance of a rule to show cause charging an attorney with criminal contempt.

Charges I and III as to which petitioner was erroneously convicted are identical with two of the findings of contempt of Judge Holtzoff entered in the *Peckham* case and considered by this Court in the *Offutt* case and there designated as findings I and VI. It was at the end of the Peckham trial that Judge Holtzoff erroneously summarily sentenced petitioner for contempt on the identical charges here involved. Petitioner appealed and on appeal the court below reversed the *Peckham* case (210 F. 2d 692) principally because the conduct of the judge directed against petitioner denied Dr. Peckham a fair trial (pp. 702-703). On petitioner's appeal from Judge Holtzoff's summary judgment the court below affirmed two charges identical with the charges here involved. *Offutt* v. *United States*, 208 F. 2d 842. This Court granted certiorari in the *Offutt* case (347 U.S. 932) and on November 8, 1954, reversed the court below and remanded the case with instructions that if petitioner were to be tried, he was entitled to a hearing before another judge. Thus all delays were caused

by errors in procedure selected by the United States and such delays, therefore, are attributable to the United States because the respondent elected to proceed summarily in a proceeding of dubious legality. That dubious choice is now established as invalid and erroneous. The transcript referred to in the application below and received in evidence and which constituted the *only* evidence submitted by the respondent in support of the charges shows that the trial of the *Peckham* case commenced on May 27, 1952, and ended on June 16, 1952. All acts relied upon in the application concerning the two charges of contempt here involved occurred prior to June 16, 1952. This means that almost three years elapsed since the events occurred on which the present charges are based. This transcript shows the erroneous adjudging of petitioner guilty of contempt in summary fashion contrary to petitioner's request for a trial and a hearing under Rule 42(b). Petitioner on the very day that Judge Holtzoff erroneously sentenced him demanded a trial to which he was entitled but this was erroneously denied him. Petitioner's right to that speedy trial which is guaranteed him by the Sixth Amendment to the Constitution was violated. How is this right to be protected? We say under due process of law the right must be protected by dismissal of stale charges or by the discharge of petitioner.

We submit that the Constitutional guarantee of a speedy trial is a part of due process of law in the Federal Courts and is self-executing. We submit that this Honorable Court, when it affirmed without opinion (76 S. Ct. 101) the case of *Petition of Provoo,* 17 F.R.D. 183, upheld the basic rulings of Judge Thomsen on the constitutional question dealing with the right

of an accused to a speedy trial which was involved in the *Provoo* case. We submit that it is now the law, as held by Judge Thomsen in the *Provoo* case, that "the right to a speedy trial is of long standing and has been jealously guarded over the centuries". Judge Thomsen ruled that this right was protected by the provisions of the Magna Charta and was a right cherished by the British people who settled the colonies.

As the *Provoo* case pointed out, Cooley, (*Constitutional Limitations,* 8th Edition, 1927, Vol. 1, p. 645, et seq.); (17 F.R.D. 183, 198) states, "when a person charged with crime is ready to proceed at once to trial no delay on the part of the prosecution is reasonable, except only that which is necessary for proper preparation and to secure the attendance of witnesses." The *Provoo* case decided that this was a rule that was applied in many State cases. *Dickoff* v. *Dewell,* 1942, 152 Fla. 240, 9 So. 2d 804; *People* v. *Molinari,* 1937, 23 Cal. App. 2d Supp. 761, 67 P. 2d 767; *Harris* v. *Municipal Court,* 1930, 209 Cal. 55, 285 P. 699; *Ex parte Miller,* 1919, 66 Colo. 261, 180 P. 749; *Von Feldstein* v. *State,* 1915, 17 Ariz. 245, 150 P. 235; *Yule* v. *State,* 1914, 16 Ariz. 134, 141 P. 570; *In re Bergerow,* 1901, 133 Cal. 349, 65 P. 828; *State* v. *Phil,* 1827, 1 Stew., Ala. 31; *State* v. *Sims,* 1807, 1 Tenn. 253; *State* v. *Stalnaker,* 1806, 2 Brev., S.C. 44; *State* v. *Maurignos,* 1805, T.U.P. Charlt., Ga. 24.

Accordingly, Judge Thomsen decided that the delay in the *Provoo* case was caused, as here, by the acts of the prosecution and that because counsel for Provoo announced ready for trial and moved to dismiss the indictment because he had been denied a speedy trial that he was entitled to the dismissal of the indictment

because the delay violated Provoo's right to a speedy trial.

The *Provoo* case cited with approval two decisions in the courts below, namely, *U. S.* v. *McWilliams,* 69 F. Supp. 812, and *U. S.* v. *McWilliams,* 163 F. 2d 695. In the *McWilliams* cases, an indictment for sedition was brought in 1944 against a number of defendants. The trial commenced but ended in a mistrial because of the presiding judge's death. Several of the defendants moved thereafter for a trial but without results. A new judge was assigned to the case early in 1946, namely Chief Judge Laws of the District Court below. He concluded it was his plain duty to dismiss the indictment stating that the long delays which had been granted prevented the defendants from obtaining a fair trial. He further held that to permit the case, after two years,[2] to go to trial would be "unjust and un-American" and a "travesty of justice" (163 F. 2d 696). On appeal, the court below unanimously affirmed Judge Laws and concluded that his dismissal of the indictment was "altogether reasonable and proper".

The refusal of the court below to dismiss the application for the rule and discharge the order to show cause conflicts with the decision in the *Provoo* case, which this Court unanimously affirmed, the decisions in the *McWilliams* cases and the numerous other decisions we have cited in this section of our petition. This constitutional question is one of great importance to the administration of criminal justice and the failure of the courts below to enforce the constitutional guarantee of the Sixth Amendment is a question of great importance which should be correctly decided to insure the proper administration of

[2] Here a delay of some three years is involved.

criminal justice and the fairness of delayed trials in the Federal courts.

The prosecution below instead of preparing appropriate and proper charges against petitioner merely excerpted the language of Judge Holtzoff's erroneous findings of guilt insofar as Charges I and III of the District Court's order are concerned. Because finding language in very general terms was used, the charge of criminal contempts against petitioner is insufficient. The two findings in general language charge only that petitioner was discourteous to the trial court and on several occasions asked prejudicial questions of witnesses for which there was no foundation. Neither the judgment below nor the findings of the court below find any instances of actual discourteous conduct or what questions were considered to have been asked by petitioner without foundation and no finding was made that petitioner's conduct was willful or obstructed the administration of justice or blocked the Peckham inquiry. We submit it is settled law in the courts of the United States since this Court's decision *In Re Watts and Sachs,* 190 U.S. 1, that before an attorney who is accused of offending against a Federal court's ruling can be found guilty of criminal contempt, that it must be charged and proven that the attorney acted in bad faith and not in the honest discharge of his duty to his client. In other words, it is necessary that a deliberate intent, that is wilfulness, be coupled with the obstruction of justice or the blocking of an inquiry before an attorney can be found guilty of contempt. In the absence of such charges and findings, as here, there is no contempt. *In re Cottingham,* et al. (Colo.), 182 P. 2; *Tracy* v. *State,* 28 Ohio Cir. Ct. Rep. 453; *State* v.

Stillwell, 8 Or. 610, 157 P. 970; *Krueger* v. *Krueger*, 32 S.D. 470, 143 N.W. 368; *In re Dealton*, 105 N.C. 59, 11 S.E. 244.

Inherent in a criminal contempt is the principle that improper conduct such as the making of false statements or the producing of false evidence, and similarly the asking of questions not based on a proper foundation in the trial of a case, must obstruct the administration of justice or block the inquiry; otherwise, there is no contempt. *Ex Parte Hudgings*, 249 U.S. 378. In the *Hudgings* case this Court held (pp. 383, 384, 385) that false statements or perjury in open court are not contempt unless those statements obstruct the administration of justice and that the treating of false statements (which are similar to the asking of questions without foundation) as contempt is a mistake because that

> "* * * overlooks or misconceives the essential characteristics of the obstructive tendency underlying the contempt power or, mistakingly attributes a necessarily inherent obstructive effect to false swearing."

The *Hudgings* case makes it clear that before conduct is contemptuous it must obstruct the performance of judicial duty or have an obstructive effect to the course of the proceedings. On this point the language of the Supreme Court in the *Hudgings* case is conclusive (pp. 383, 384, 385):

> "It is true that there are decided cases which treat perjury, without any other element, as adequate to sustain a punishment for contempt. But the mistake is, we think, evident, since it either overlooks or misconceives the essential characteristic of the obstructive tendency under-

lying the contempt power, or mistakenly attributes a necessarily inherent obstructive effect to false swearing. If the contention were true, it would follow that when a court entertained the opinion that a witness was testifying untruthfully the power would result to impose a punishment for contempt with the object or purpose of exacting from the witness a character of testimony which the court would deem to be truthful; and thus it would come to pass that a potentiality of oppression and wrong would result and the freedom of the citizen when called as a witness in court would be gravely imperiled.

Testing the power to make the commitment which is under consideration in this case by the principles thus stated we are of opinion that the commitment was void for excess of power—a conclusion irresistibly following from the fact that the punishment was imposed for the supposed perjury alone without reference to any circumstance or condition giving to it an obstructive effect. Indeed, when the provision of the commitment directing that the punishment should continue to be enforced until the contempt, that is, the perjury, was purged, the impression necessarily arises that it was assumed that the power existed to hold the witness in confinement under the punishment until he consented to give a character of testimony which in the opinion of the court would not be perjured.

In view of the nature of the case, of the relation which the question which it involves bears generally to the power and duty of courts in the performance of their functions, of the dangerous effect on the liberty of the citizen when called upon as a witness in a court which might result if the erroneous doctrine upon which the order under review was based were not promptly corrected, we are of the opinion that the case is an

exception to the general rules of procedure to which we have at the outset referred, and therefore that our duty exacts that we finally dispose of the questions in the proceeding for habeas corpus which is before us. It is therefore

Ordered that the petitioner be discharged."

To the same effect are the cases of *United States* v. *Arbuckle,* 48 F. Supp. 537, and *United States* v. *Appel,* 211 F. 495. And *Clark* v. *United States,* 289 U.S. 1, 11, 87 L. Ed. 609, makes it clear that there can be no contempt, even when the action occurs in open court, unless there is an obstruction to the performance of judicial duty resulting and this is the characteristic upon which the power to punish for contempt must rest.

In reviewing this aspect of criminal contempts in the Federal courts the report of the Los Angeles Bar Association, after a review of the authorities, states the general principle that we contend for as announced in the decisions of this Court as follows (17 F.R.D. 167, 179): "It is generally held that a criminal contempt proceeding will not lie unless the act of the defendant was willful, or as sometimes stated, contumacious". As there was no charge or finding of wilfulness coupled with the obstruction in the performance of judicial duties the court below should have remanded the case to the District Court with instructions to dismiss the application and discharge the rule. The erroneous decisions below, therefore, should be resolved and corrected in the public interest.

II

The court below should have remanded the case with instructions that a judgment be entered acquitting petitioner of Charges I and III of the District Court's order to show cause because that court found and decided that these charges had been established only by a "fair preponderance of the evidence" rather than "beyond a reasonable doubt". The second order of the District Court attempting to find guilt on a different and more prejudicial basis, after petitioner perfected his appeal and filed his bail bond, was beyond the power of the District Court to enter and should have been determined to have been a nullity.

The first judgment of the District Court was entered in the Clerk's Office at 10:15 a.m. An appeal was taken by petitioner at 11:00 a.m. on the same day by the filing of a notice of appeal in duplicate in accordance with the Rules of Criminal Procedure, the clerk's fees were paid and petitioner filed his bail bond on appeal in the amount of $1,000 as provided in the District Court's judgment. The notice of appeal and the filing of the bond in this case by the terms of the judgment itself perfected the appeal and ousted the District Court of any jurisdiction to change its judgment filed at 10:15 a.m. *Smith* v. *Pollin,* 90 U.S. App. D.C. 178, 194 F. 2d 349; *Goldsmith* v. *Valentine,* 35 U.S. App. D.C. 299; *Potts* v *Catherton,* (D.C. Mun. App.) 82 A. 2d 133; *Maltby* v. *Thompson,* (D.C. Mun. App.) 55 A. 2d 142.

When the appeal below was perfected and particularly when the bail bond on appeal was filed in accordance with the terms of the judgment appealed from, the District Court lost its power to change the appealed judgment. *Simmons* v. *United States,* 89 F. 2d 591; *Purman* v. *Marsh,* 49 U.S. App. D.C. 125, 261 F. 1005; *Lasier* v. *Lasier,* 47 U.S. App. D.C. 80; *Whitney* v. *Frisbie,* 6 D.C. 262.

Yet about 4:00 p.m. on the day of the entry of the first judgment the District Court belatedly filed a second order attempting to apply a different test to the evidence. This we submit was beyond the power of that court to do. The second order was a nullity. Any other rule would cause chaos in appellate proceedings.

In the *Simmons* case, in a unanimous opinion, the Court of Appeals for the Tenth Circuit in dealing with this question held (pp. 594-595):

> "There is another exception to the rule. Where an appeal has been perfected, jurisdiction of the trial court is suspended pending appeal, and that court can do nothing that would weaken or set aside the judgment on appeal. The reason for this rule is readily apparent. If the trial court could amend the judgment at all, it could so amend it as to render it nugatory and either destroy the basis of the appeal or make the case in the appellate court moot.
>
> * * * * *
>
> "After an appeal is taken the trial court has limited jurisdiction to enter orders in aid of the appellate jurisdiction."
>
> * * * * *
>
> "Of course, on a suggestion of diminution of the record, we could order up missing parts of the record and it may be conceded that there was power in the District Court within the term to correct clerical errors in the record to make it conform to the judgment on appeal. But that was not what was attempted to be done. What the trial court did went far beyond a legitimate effort to correct the minutes and was intended to enter an entirely new judgment. This was not in support of the judgment on appeal. On the contrary, if permitted, it would be destructive of it.

> The proceedings in the District Court we are asked to order up and make part of the record on appeal were had after appellant began to serve the sentence and after the appeal had been perfected. We consider that the District Court was without jurisdiction to make the correction alleged in the petition. The petition to correct the record is denied."

The *Maltby* case clearly enunciates the correct principle applicable to District of Columbia cases. There, as here, a trial judge, after a judgment had been entered and on the same day when the notice of appeal had been filed, attempted to take an action very similar to that taken by Judge McLaughlin below and entered an order reciting that upon reconsideration the court was of the opinion that the plaintiff had failed to meet his burden of proof and ordered a new trial under Municipal Court Rule 42(a) which authorizes a trial judge on his own initiative within ten days after trial to order a new trial. The Municipal Court of Appeals in a unanimous opinion held (p. 143) that to permit the entry of this type of order after a notice of appeal had been filed would have the effect of vacating or nullifying the appeal and would make notices of appeal provisional, and concluded (p. 143):

> "We hold that the appeal was effective and that the order granting a new trial was ineffective."

The note of the Advisory Committee on the amendments to the Federal Rules of Civil Procedure (Note 1, Subdivision H) tersely states:

> "The District Court has no power to add to or distract from a designated record except insofar as it may be necessary to correct omissions or misstatements * * *."

The District Court's attempt to change the substance of an order after it had been appealed from and after the appeal had been perfected is obviously a nullity. Therefore, the court below should have decided that the first order was the controlling order in petitioner's case. The first judgment of the District Court found petitioner guilty on Charges I and III only by a preponderance of the evidence. This erroneous test, of course, is unknown in Federal Criminal law. *Gompers* v. *Bucks Stove & Range Co.*, 221 U.S. 418, 31 S. Ct. 492, 55 L. Ed. 797, 34 L.R.A. (U.S.) 874; *United Mine Workers* v. *United States*, 330 U.S. 258, 67 S. Ct. 677, 91 L. Ed. 884; *Michaelson* v. *United States, ex rel. Chicago, St. Paul, Minneapolis & Omaha Railway Co.*, 266 U.S. 42, 45 S. Ct. 18, 69 L. Ed. 162, 35 A.L.R. 451; *Lombardo* v. *United States*, 58 U.S. App. D.C. 245, 29 F. 2d 445.

As the prosecution below deliberately rested its case upon the transcript of the Peckham trial and produced no other evidence of any sort and persuaded the District Court to refuse to permit petitioner to testify or adduce any evidence by way of defense, explanation or mitigation, nevertheless the District Court found on that abortive record that petitioner was guilty of Charges I and III *only by a preponderance of the evidence.* As this is an insufficient basis on which to find petitioner guilty of two charges of criminal contempt, the court below should have remanded the case to the District Court with instructions to enter a judgment acquitting petitioner. Such a flagrant violation of the accused's right to be tried and be found guilty only where the evidence proves guilt beyond a reasonable doubt should be corrected and resolved in order to preserve the fair and

proper administration of criminal justice in contempt cases in the Federal courts.

III

The second judgment of conviction belatedly entered by the District Court, which was more prejudicial to petitioner and found him guilty on a different basis than that contained in the first finding and judgment of the District Court, was a nullity and void as an attempt to twice sentence and punish the petitioner for the same offense in violation of the Fifth Amendment to the Constitution.

As we have shown the record as made shows a first finding of guilt based upon a preponderance of the evidence only. Thereafter and after an appeal had been perfected, the District Court attempted to change the substance of its first order by entering a second order to the detriment of petitioner's appeal and finding guilt on a different and more prejudicial basis. This is a clear sentencing and punishing of petitioner twice and on different bases for the same offense.

The Fifth Amendment to the Constitution forbids an accused from being sentenced for the same offense more than once. This Court has held that the vacating of one sentence and the entering of a second sentence, which is more prejudicial to the accused, violates this constitutional provision. In reviewing the right of a Federal court to impose a second sentence on an accused more prejudicial than the first one, this Court, in *Ex Parte Lange,* 18 Wall. 163, 167-174, 21 L. Ed. 872, said:

> "This argument seems to us irresistible, and we do not doubt that the Constitution was designed as much to prevent the criminal from being twice punished for the same offense as from being twice tried for it."

In holding that resentencing to the disadvantage of the accused violates the Fifth Amendment, this Court said:

> "Can the court vacate that judgment entirely, and without reference to what has been done under it, impose another punishment on the prisoner on that same verdict? To do so is to punish him twice for the same offense. He is not only put in jeopardy twice, but put to actual punishment twice for the same thing."

And in *United States* v. *Benz*, 282 U.S. 304, 75 L. Ed. 354, this Court quoted at length from the *Lange* case and again pointed out that the power of a district court to amend judgments in a criminal case is confined to reducing the sentence or to changing the sentence in favor of the accused and that power can never be used to impose a second sentence more detrimental to the accused than the first one. We submit that both courts below disregarded the constitutional principles which this Court clearly announced in the *Benz* and *Lange* cases, and that the proper application of these principles renders the second sentence attempted to be imposed below a nullity and requires that the case be remanded with instructions to enter a judgment of acquittal because the prosecution failed to establish guilt beyond a reasonable doubt.

The decisions below are such a departure from the proper administration of criminal justice as to require the exercise by this Court of its powers of correction if criminal proceedings in our Federal courts are to be conducted fairly and in accordance with recognized constitutional provisions. We submit that if the opinion below is not properly modified that constitutional safeguards guaranteeing to the accused both a

speedy and fair trial will not have been maintained and that the respect of the public for the fairness of criminal proceedings in the Federal Courts will have been impaired.

WHEREFORE, your petitioner respectfully prays in this petition that this Honorable Court grant a writ of certiorari and bring before this Court the decision and judgment of the United States Court of Appeals for the District of Columbia Circuit.

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APPENDIX

APPENDIX

INDEX TO APPENDIX

	Page
Order of the District Court filed May 11, 1955	1a
Order of the District Court filed May 11, 1955	2a
Opinion of the United States Court of Appeals for the District of Columbia Circuit entered February 16, 1956	4a
Order Modifying Opinion	10a
Order Denying Petition for Rehearing	11a

APPENDIX

(Filed May 11, 1955)

[Caption omitted in printing]

Order

This matter having come on for hearing upon the Application of the United States Attorney for the District of Columbia for an order to show cause why Dorsey K. Offutt should not be adjudged in criminal contempt of this Court and upon the order to show cause issued on the basis of said application and upon the return to rule to show cause filed by Dorsey K. Offutt, and the cause having been presented at the hearing in open court upon the evidence, consisting of the record in the case of United States of America versus Peckham, Criminal No. 579-52, in the District Court of the United States for the District of Columbia, and the Court having fully considered the foregoing and the arguments of counsel, hereby finds and determines, on the basis thereof, as follows:

It has been established by a preponderance of the evidence that Dorsey K. Offutt is guilty of Charge I of the Order to Show Cause.

It has not been established by a preponderance of the evidence that Dorsey K. Offutt is guilty of Charge II of the Order to Show Cause.

It has been established by a preponderance of the evidence that Dorsey K. Offutt is guilty of Charge III of the Order to Show Cause.

Therefore, in the circumstances, it is this 11th day of May, 1955,

ORDERED, ADJUDGED AND DECREED that Dorsey K. Offutt is guilty of criminal contempt of court in Charge I and Charge III, and it is further

ORDERED, ADJUDGED AND DECREED that Dorsey K. Offutt is not guilty of criminal contempt of court in Charge II and he is hereby acquitted of Charge II.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Dorsey K. Offutt's punishment for his guilt of Charge I and Charge III be and same is hereby fixed at a fine of Five Hundred ($500.00) Dollars, and that he be committed until said fine be paid or until he be discharged by due process of law.

The commitment will be stayed until Monday May 16, 1955.

In the event an appeal is perfected from the above order, bond is hereby fixed in the penal sum of One Thousand ($1,000.00) Dollars.

By the Court

CHARLES F. MCLAUGHLIN
Judge

(Filed May 11, 1955)

Order

The order heretofore entered this 11th day of May 1955 in this cause in respect of Charges I, II and III of the Order to Show Cause herein is hereby withdrawn, set aside and held for naught and the following order is hereby entered in lieu thereof:

This matter having come on for hearing upon the Application of the United States Attorney for the District of Columbia for an order to show cause why Dorsey K. Offutt should not be adjudged in criminal contempt of this Court and upon the order to show cause issued on the basis of said application and upon the return to rule to show cause filed by Dorsey K. Offutt, and the cause having

been presented at the hearing in open court upon the evidence, consisting of the record in the case of United States of America versus Peckham, Criminal No. 579-52, in the District Court of the United States for the District of Columbia, and the Court having fully considered the foregoing and the arguments of counsel, hereby finds and determines, on the basis thereof, as follows:

It has been established beyond a reasonable doubt by the evidence that Dorsey K. Offutt is guilty of Charge I of the Order to Show Cause.

It has not been established beyond a reasonable doubt by the evidence that Dorsey K. Offutt is guilty of Charge II of the Order to Show Cause.

It has been established beyond a reasonable doubt by the evidence that Dorsey K. Offutt is guilty of Charge III of the Order to Show Cause.

Therefore in the circumstances, it is this 11th day of May, 1955

ORDERED, ADJUDGED AND DECREED that Dorsey K. Offutt is guilty of criminal contempt of court in Charge I and Charge III, and it is further

ORDERED, ADJUDGED AND DECREED that Dorsey K. Offutt is not guilty of criminal contempt of court in Charge II and he is hereby acquitted of Charge II.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Dorsey K. Offutt's punishment for his guilt of Charge I and Charge III be and same is hereby fixed at a fine of Five Hundred ($500.00) Dollars, and that he be committed until said fine be paid or until he be discharged by due process of law.

The commitment will be stayed until Monday, May 16, 1955.

In the event an appeal is perfected from the above order, bond is hereby fixed in the penal sum of One Thousand ($1,000.00) Dollars.

By the Court

CHARLES F. MCLAUGHLIN
Judge

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12750-1

DORSEY K. OFFUTT, *Appellant*
v.
UNITED STATES OF AMERICA, *Appellee*

Appeals from the United States District Court
for the District of Columbia

Decided February 16, 1956

Mr. Warren E. Magee, with whom *Miss Charlotte Maskey* was on the brief, for appellant.

Mr. Oliver Gasch, Principal Assistant United States Attorney, with whom *Messrs. Leo A. Rover,* United States Attorney, *Lewis Carroll* and *David W. Kindleberger,* Assistant United States Attorneys, were on the brief, for appellee.

Before EDGERTON, Chief Judge, and BAZELON and FAHY, Circuit Judges.

FAHY, *Circuit Judge*: When the Supreme Court in *Offutt* v. *United States,* 348 U.S. 11,[1] reversed our modified af-

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[1] Reversing *Offutt* v. *United States,* 93 U.S. App. D.C. 148, 208 F. 2d 842.

firmance of the District Court's conviction of appellant of criminal contempt it did so on the basis of the rule pronounced in *Cooke* v. *United States*, 267 U.S. 517. The Court regarded this decision as applicable because of the District Judge's personal involvement in the incidents out of which the alleged contempt arose during the trial of *United States* v. *Peckham*.[2] The judge presided at the trial and appellant defended Peckham. The Supreme Court thought that the fair administration of justice required the contempt proceedings to be removed from the atmosphere created by the controversies between the judge and appellant which occurred during the trial. The Court said:

> "In the language of the *Cooke* case, with one appropriate change, 'We think, therefore, that when this case again reaches the District Court to which it must be remanded, the judge who imposed the sentence herein should invite the Chief Judge of the District Court to assign another judge to sit in the second hearing of the charge against the petitioner.' See 267 U.S., at 539." 348 U.S. at 18.

On the remand another judge was duly assigned to sit. The United States Attorney filed with him an application for an order to show cause why appellant should not be held in contempt of court. Such an order was made and served. It called upon appellant to show cause why he should not be adjudged in criminal contempt of the District Court for misbehaving in the presence of the court or so near thereto as to obstruct the administration of justice[3] in the following two respects:[4]

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[2] The conviction in that case was reversed in *Peckham* v. *United States*, 93 U.S. App. D.C. 136, 210 F. 2d 693.

[3] The applicable statute reads in pertinent part:

"A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—

(1) Misbehavior of any person in its presence or so near

"I. On numerous occasions, he made insolent, insulting and offensive remarks to the court, and was guilty of gross discourtesy to the court.

"• • •

"III. On several occasions he asked of witnesses questions that were highly prejudicial to the witness and for which there was no foundation. Thus, he asked Mary Ott, the victim of the abortions charged against the defendant [Peckham], '*When* were you arrested in this case?' As a matter of fact she never had been arrested and when called to account by the court, Offutt only answered that he had a right to enquire *whether* the witness had been arrested in this case."

The case was heard by the newly assigned judge. The United States introduced in support of the charges the transcript of the *Peckham* trial. Appellant offered to prove by the testimony of himself and members of the bar who were present during that trial that he was not insolent and did not make insulting and offensive remarks to the court and was not guilty of gross discourtesy to the court; that, instead, the presiding judge at the *Peckham* trial throughout its course exhibited anger, temper and an antagonistic attitude toward appellant and his client, racing him through the examination of witnesses and generally exhibiting impetuosity toward appellant; that the prosecutor indulged in unusual and unseemly conduct and made prejudicial statements; that this attitude on the part of judge and prosecutor made it extremely difficult for appellant properly to present the defense; that he took no action or attitude except to preserve error on the record; that his objections and motions which were based upon the

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thereto as to obstruct the administration of justice; • • •." 62 Stat. 701 (1948), 18 U.S.C. § 401 (1952).

[4] Two other charges, numbered II and IV, were included, but as to them appellant was found not guilty.

conduct, personal mannerisms, tone of voice, gesticulations, movements and actions of the trial judge, were made in good faith and for the purpose of protecting the accused; that all questions were asked of the witnesses in good faith and for the purpose of putting the witnesses in their true light and to show to the jury the meretricious relationships of witnesses as those relationships affect morals, hence credibility; that appellant believed when he asked the questions that there was a proper foundation for each; that appellant acted in good faith in accordance with what he believed to be the law and in order to afford effective assistance of counsel to his client; and that his actions were not for the purpose of prejudicing witnesses.

Appellant's proffer was denied and the case was decided on the basis of the transcript of the *Peckham* trial. Appellant was found guilty of criminal contempt on each of the two charges hereinabove set forth. His punishment was fixed as a fine of $500.00.

A necessary and logical consequence of the Supreme Court's requirement that the *Cooke* procedure be applied was that such testimony as appellant proffered should have been received and considered. Ordinarily where the conduct alleged to be criminally contemptuous occurs during a trial the presiding judge sees and hears all that bears upon the issue of contempt. No additional testimony is needed in the usual summary proceedings under § 42(a), Fed. R. Crim. P. But here a different judge sat. The transcript alone did not make available to him all relevant and material evidence.

Evidence of the general purport of that proffered was relevant and material and should have been received. With reference to Charge I, demeanor might have an important bearing on whether appellant was guilty of "gross discourtesy" to the court, or whether his remarks were "insolent, insulting and offensive." Evidence as to tone and inflection of voice and manner of behavior might give char-

acter to the printed word. And if after receiving the evidence the court believed Offutt guilty of contempt, the evidence might induce the court to mitigate the punishment. The *Cooke* opinion refers to the right of the accused "to call witnesses to give testimony, relevant either to the issue of complete exculpation or in extenuation of the offense and in mitigation of the penalty to be imposed." 267 U.S. at 537. While that case differed from this one in that Cooke's alleged contempt was not committed in open court, they are the same in that both were required to be heard by a judge other than the one involved in the incidents, and it is this which we regard as determinative. If the court excludes such evidence as was offered we think Offutt is denied a full and fair means of defending, or mitigating his punishment, within the principles of the *Cooke* case. We think this conclusion is in harmony with the Supreme Court's view that since the contempt power is not circumscribed by all of the constitutional safeguards accompanying an ordinary criminal trial, its exercise must be carefully regulated. See *In re Michael*, 326 U.S. 224, 227; *Nye* v. *United States*, 313 U.S. 33, 49; *Offutt* v. *United States*, 348 U.S. 11, 14.

Like considerations apply to the proffer relating to Charge III. It may be true that a finding of contumacious intent is not always a prerequisite to a contempt conviction under 18 U.S.C. § 401(1); absence of such intent may go only to mitigation. *Kelly* v. *United States*, 250 Fed. 947, 950 (9th Cir.); *United States* v. *Sanders*, 290 Fed. 428, 437 (W.D. Tenn.); *cf. Clark* v. *United States*, 61 F.2d. 695, 704 (8th Cir.), *affirmed*, 289 U.S. 1; *Cammer* v. *United States*, ——— U.S. App. D.C. ———, 223 F.2d 322, *cert. granted*, 350 U.S. 817; *So. Butte Mining Co.* v. *Thomas*, 260 Fed. 814, 821 (9th Cir.), *cert. denied*, 253 U.S. 486; *In re Braun*, 259 Fed. 309, 311 (M.D. Pa.). But a finding of "misbehavior" is essential. See note 3 *supra*. Thus, when the conduct in question is not clearly blameworthy, consisting, as here, of asking witnesses incompetent questions, there is

no contempt unless there is some sort of wrongful intent. *Cf. In re Watts and Sachs,* 190 U.S. 1, 32, 35; *Wilson* v. *No. Carolina,* 169 U.S. 586, 600; *May Hosiery Mills* v. *United States District Court,* 64 F.2d 450, 453 (9th Cir.). See, also, Comment, 48 Mich. L. Rev. 860, 864-868; Harper and Haber, "Lawyer Troubles in Political Trials," 60 Yale L.J. 1, 19. If Offutt was guilty of "gross discourtesy" to the court, or if his remarks in all the circumstances were "insolent, insulting and offensive," as is alleged in Charge I, he is guilty of misbehavior and there is no need to make special inquiry into intent, except as to mitigation.[5] Such conduct may be called misbehavior per se, or a wrongful intent may be presumed. But the conduct involved in Charge III is of a different character. If Offutt were able to introduce evidence tending to prove that he believed there was a foundation for the questions he asked the witnesses, the court might conclude that he was not guilty of misbehavior in asking them. We do not mean that his mere assertion, or his other evidence, would necessarily outweigh the inferences which may be drawn from the record, but he should have the opportunity to introduce such evidence for the court's consideration. And, in addition, some of the evidence offered no doubt would be relevant and material to the question of mitigation.

We add that in the exercise of a sound discretion the hearing judge may control the scope of testimony and the number of witnesses, to avoid cumulative testimony and to prevent placing on trial either the judge before whom the alleged contempt occurred or the prosecutor in the *Peckham* trial. What is required, however, is that the accused be permitted to adduce testimony which fairly depicts to the deciding judge the actual conduct of the accused in the setting in which it occurred.

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[5] Since the conduct occurred in the presence of the court we think if it is found to constitute misbehavior the essential elements of the charge would be proved. See text at note 3, *supra.*

It is not necessary to discuss the other points raised by appellant; for upon remand the case may be disposed of consistently with this opinion.

Reversed and remanded.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12750-1

January Term, 1956
Filed March 12, 1956

DORSEY K. OFFUTT, *Appellant*

v.

UNITED STATES OF AMERICA, *Appellee*

Before: Edgerton, Chief Judge, and Bazelon and Fahy, Circuit Judges, in Chambers.

Order

It is ORDERED by the Court that the opinion filed herein February 16, 1956, be, and it is hereby, amended as follows:

On page 6, beginning in line 4, strike out the following:

> he was guilty of misbehavior and there is no need to make special inquiry into intent, except as to mitigation.[5] Such conduct may be called misbehavior per se, or a wrongful intent may be presumed.

and insert in lieu thereof the following:

> and he were found guilty of misbehavior by reason of such conduct there would be no need to make special

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[5] Since the conduct occurred in the presence of the court we think if it is found to constitute misbehavior the essential elements of the charge would be proved. See text at note 3, *supra*.

inquiry into intent, except as to mitigation.[5] In that event the finding of misbehavior might be regarded as including, by necessary implication, a finding of wrongful intent.

Per Curiam.

Dated: March 12, 1956

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12,750 and 12,751

April Term, 1956
Filed April 6, 1956

DORSEY K. OFFUTT, *Appellant*

v.

UNITED STATES OF AMERICA, *Appellee*

Before: Edgerton, Chief Judge, Bazelon and Fahy, Circuit Judges, in Chambers.

Order

Upon consideration of appellant's petition for rehearing, it is

ORDERED by the Court that the aforesaid petition be, and it is hereby, denied.

Per Curiam.

Dated: April 6, 1956

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statutes involved	2
Statement	4
Argument	6
Conclusion	8

CITATIONS

Case:

Offutt v. *United States*, 348 U.S. 11 4

Statute and Rule:

18 U.S.C. 401 2
Rule 42, F. R. Crim. P. 3

In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 928

DORSEY K. OFFUTT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. App. 4a-10a) has not yet been reported.

JURISDICTION

The judgment of the Court of Appeals was entered on February 16, 1956. A petition for rehearing was denied on April 6, 1956 (Pet. App. 11a). The petition for a writ of certiorari was filed on May 5, 1956. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, after reversal of petitioner's summary conviction for contempt by the judge who had presided at the trial at which petitioner was defense counsel, charges of contempt based on petitioner's conduct at the trial could properly be brought on for trial before another judge on application of the United States Attorney.

2. Whether the fact that three years elapsed during the course of petitioner's appeal, which ultimately resulted in a reversal of his conviction for contempt with direction for a new trial, required dismissal of the charges for lack of a speedy trial.

3. Whether the fact that the judge originally found petitioner guilty by a preponderance of the evidence, and then—a few hours later, but after a notice of appeal had been filed—corrected the judgment to show a finding of guilt beyond a reasonable doubt, entitles petitioner to a judgment of acquittal.

STATUTES INVOLVED

18 U.S.C. 401 provides:

> A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—
>
> (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

(2) Misbehavior of any of its officers in their official transactions;

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

Rule 42, Federal Rules of Criminal Procedure, provides:

(a) Summary Disposition.

A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

(b) Disposition Upon Notice and Hearing.

A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled

to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment.

STATEMENT

In *Offutt* v. *United States,* 348 U.S. 11, decided November 8, 1954, this Court reversed petitioner's conviction on four specifications of contempt, which had been affirmed by the Court of Appeals for the District of Columbia Circuit (208 F. 2d 842), arising out of petitioner's conduct as defense attorney in the criminal trial of one Peckham in June 1952. This Court held that the district judge who had presided at the trial had sufficiently "permitted himself to become personally embroiled with the petitioner" to require that another judge sit on the rehearing of the charges (348 U.S. at 17-18). The case was remanded to the District Court on December 28, 1954.

On March 11, 1955, on application of the United States Attorney, Judge McLaughlin, who had been assigned to hear the case,* issued an order re-

* The United States Attorney, in his brief in the Court of Appeals, stated that, after the remand, Judge Holtzoff, who had presided at the trial of the contempt charges, requested Chief Judge Laws to assign another judge to sit on the second contempt hearing. Chief Judge Laws declined to act because of action previously taken by petitioner to disqualify him to sit on disbarment charges against petitioner. Judge Morris,

quiring petitioner to show cause why he should not be punished for contempt for his misbehavior in the presence of the court at the *Peckham* trial (R. 2-5). The specifications were substantially the same as those which had previously been affirmed by the Court of Appeals, *i.e.*, (1) insolent and offensive remarks and gross discourtesy to the court on numerous occasions, (2) persistence in repeating questions previously excluded, (3) asking of prejudicial questions for which there was no foundation, and (4) attempt to create an episode which might lead to a mistrial (R. 2-3).

Petitioner's motion to dismiss on the ground of denial of a speedy trial (R. 6-7) was overruled.

Judge McLaughlin ruled that he would hear oral testimony on the fourth specification, but would determine the other three charges on the record of the *Peckham* trial at which the conduct charged as contumacious occurred (R. 33). No evidence was offered on the fourth charge, and petitioner was acquitted thereon (R. 16).

At the hearing on the charges on May 9, 1955, the record of the *Peckham* trial was introduced in evidence (R. 38). Petitioner made an offer of proof to the effect that he and witnesses whom he would call would testify that he had not been insolent or discourteous, and that, on the contrary, the presiding judge at the *Peckham* trial had exhibited anger and an antagonistic attitude

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acting as presiding judge, assigned the case to Judge McLaughlin and requested the United States Attorney to take appropriate action to bring the case on for hearing.

toward petitioner (R. 14-15). Judge McLaughlin, in accordance with his previous ruling, declined to permit such testimony (R. 36). On the morning of May 11, 1955, Judge McLaughlin entered an order finding petitioner guilty on charges (1) and (3) by a preponderance of the evidence (R. 16). That afternoon, after petitioner had noted an appeal, but, the United States Attorney informs us, before the duplicate notice had been received by the Court of Appeals, the judge entered a new order finding petitioner guilty on charges (1) and (3) beyond a reasonable doubt (R. 18-19).

The Court of Appeals reversed the conviction and ordered a new trial on the ground that petitioner should have been permitted to offer oral testimony in his defense (Pet. 4a-10a).

ARGUMENT

Although petitioner's conviction for contempt was reversed by the Court of Appeals, he seeks further review by this Court in an effort to obtain dismissal of the charges or a judgment of acquittal without a retrial. He is not entitled to this further relief.

1. Petitioner argues (Pet. 12-14) that the charges against him should have been dismissed because there was no order appointing the United States Attorney to act for the court until after the United States Attorney applied for an order to show cause why petitioner should not be punished for contempt. As set forth in the footnote, *supra*, p. 4, it appears that in fact the United

States Attorney was requested by the court to investigate the bringing of charges against petitioner. In any event, there is no provision in the rules making a written request by the judge to the United States Attorney a prerequisite to the bringing of charges of contempt on notice. Rule 42(b) provides for notice by the judge in open court "or, on application of the United States Attorney, or of an attorney appointed by the court for that purpose." Clearly the United States Attorney may act without specific appointment by the court for that purpose.

2. Petitioner was not denied a speedy trial by reason of the lapse of three years taken up by the appeal from his original conviction (see Pet. 14-18). A certain amount of delay pending review in the Court of Appeals and in this Court was of course inevitable, but petitioner, as appellant, could undoubtedly have speeded up the review process had he wished to do so. For example, after the initial affirmance by the Court of Appeals on November 19, 1953, petitioner sought rehearing in that court and then applied for an extension of time to file a petition for a writ of certiorari, with the result that his petition was not filed until February 12, 1954 (See Brief in Opposition, No. 589, O.T. 1953).

The record of the *Peckham* trial remains unchanged by the passage of time. Petitioner and such witnesses as he wishes to offer are still available to testify. By securing a new trial on appeal,

petitioner did not acquire immunity from prosecution.

3. Since the Court of Appeals reversed the judgment, the question (Pet. 22-28) as to the validity of the second judgment entered by Judge McLaughlin (see Statement, *supra*, p. 6) is not now in the case. Judge McLaughlin never acquitted petitioner. Even assuming that the second judgment could not have been entered after the appeal had been noted, there would have been a conviction of petitioner on a wrong standard of the burden of proof. Petitioner would then have been entitled to reversal of the judgment with direction for a new trial under the proper standard, exactly the relief which he now has.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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